HONG LEONG BANK BHD

v.

LEE KHAI SIN

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24-212-2004-II]
1 MARCH 2005

LAND LAW: *Charge - Order for sale - Application for - Default in repaying term loan facility - Allegation by defendant that plaintiff failed to prove loan released to defendant - Whether stamp duty paid in respect of Memorandum of Charge showed sum of RM420,000 had been lent to defendant - Whether plaintiff complied with s. 4(3) of First Schedule of the Stamp Act 1949 - Statutory notice of demand - Whether contravened s. 148(3) of Land Code (Cap 81) (Sarawak) - Whether null and void*

LAND LAW: *Charge - Order for sale - Application for - Statutory notice of demand - Failure to comply with term of Memorandum of Charge - Contravening s.148(3) of Land Code (Cap 81) (Sarawak) - Whether null and void - Whether just for court to grant order for sale applied for*

The plaintiff applied for an order for sale of the charged land *vide* originating summons pursuant to s. 148 of the Land Code (Cap. 81) (Sarawak) ('the Sarawak Land Code'). The defendant opposed the plaintiff's application on, *inter alia*, the following grounds: (1) that the stamp duty paid in respect of the memorandum of charge ('the said charge') did not show that a sum of RM420,000 had been lent and released to the defendant and (2) that the period of statutory notice was in breach of s. 148(3) of the Sarawak Land Code and that the plaintiff's demand that defendant pay the outstanding balance of the term loan facility within seven days from the date of the statutory notice was prejudicial.

Held (dismissing plaintiff's originating summons with costs):

[1] The total sum of RM420,000 had been debited into the defendant's account *vide* the plaintiff's debit advice dated 26 September 2000 and 25 October 2000 for the sum of RM180,000 and RM240,000 (exh. HMK6 and exh. HMK7) respectively. The total loan have been released. Further there was no dispute that the defendant had signed and accepted the letter of offer (exh. HMK10) wherein it was stated therein that the purpose of the term loan facility was to purchase land and construction of residential

property as this fact was admitted by the defendant that "the monies were to be utilised by him to purchase a piece of land." The plaintiff had complied with s. 4(3) of the First Schedule of the Stamp Act 1949. From the stamping endorsed on the facilities agreement, the stamp duty paid was RM2,100 as was evident by an endorsement in the said charge to prove that the same was paid. The stamp duty of RM10 was also paid for the said charge. (p 475 a-e)

[2] The word 'shall' in s. 148(3) of the Sarawak Land Code would mean that the requirement to comply with the term of the said charge was mandatory. It was patently clear that the statutory notice given by the plaintiff had failed to comply with the term of the said charge as the statutory notice required the defendant to pay the sum of RM404,614.62 within seven days from the date of the said statutory notice while cl. 4.01 of the said charge required the defendant to pay the sum of RM404,614.02 from the date in which the said statutory notice of demand shall be deemed to be served on the defendant under the terms of the said charge. The statutory notice was null and void for non-compliance with cl. 4.01 of the said charge and for contravening s. 148(3) of the Sarawak Land Code. A perusal of exh. HMK5 showed that the statutory notice dated 12 March 2004 was only sent by registered post to the defendant on 15 March 2004. The statutory notice failed to comply with the terms of the said charge as it gave the defendant less than seven days to comply while the said charge stated a period of seven days for the defendant to comply with the statutory notice. It was therefore not just for the court to grant the order for sale applied by the plaintiff. (pp 477 g-h & 478 a-e)

Case(s) referred to:

Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Sdn Bhd [2004] 4 CLJ 793 CA ***(refd)***

Citibank NA v. Jong Tze Khiok & Anor [1993] 4 CLJ 325 SC ***(refd)***

Kuching Plaza Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Anor Appeal [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223 SC ***(refd)***

Legislation referred to:

Land Code (Cap 81) (Sarawak), s. 148(2)(c), (3)
Rules of the High Court 1980, O. 83 rr. 3(3), (7)
Stamp Act 1949, s. 4(3)

For the plaintiff - Alicia Voon; M/s Alvin Chong & Partners
For the defendant - Kenny Yi Lee Chuen; M/s Yi & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

Vide an originating summons dated 11 June 2004, the plaintiff essentially applied for an order for sale of the charged land, Lot 1508 Block 16 Kuching Central Land District pursuant to s. 148 of the Sarawak Land Code (Cap. 81) ("the Sarawak Land Code").

The plaintiff's application is supported by:

(i) The affidavit of Ho Min Khiong affirmed on 11 June 2004 ("the plaintiff 1st affidavit") (encl. 3).

(ii) The affidavit in reply of Ho Min Khiong affirmed on 25 August 2004 ("the plaintiff 2nd affidavit") (encl. 13).

(iii) The affidavit in reply (2) of Ho Min Khiong affirmed on 17 September 2004 ("the plaintiff 3rd affidavit") (encl. 26).

The defendant opposed the plaintiff's application by:

(i) The affidavit in opposition affirmed by the defendant on 11 August 2004 ("the defendant 1st affidavit") (encl. 10).

(ii) The affidavit in opposition II affirmed by the defendant on 2 September 2004 ("the defendant 2nd affidavit") (encl. 20).

(iii) The affidavit in opposition III affirmed by the defendant on 1 October 2004 ("the defendant 3rd affidavit") (encl. 30).

The court has considered the written cum oral submissions of both the learned counsel for the plaintiff and defendant, Ms. Alicia Voon and Mr. Kenny Yi respectively. The court's findings and evaluation include:

(1) It is not in dispute that since the plaintiff's application is for order for sale made under s. 148 of the Sarawak Land Code, the court's power to make such an order is discretionary and the court may make such an order as "in the circumstances seems just" which "would seem to raise the question what (are) the circumstances existing that would make the order for sale not seem just", (see *Kuching Plaza Sdn Bhd v. Bank Bumiputra Malaysia Bhd and Anor Appeal* [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223.

(2) Based on the various affidavits alluded above and defendant's written submission, the defendant is opposing the plaintiff's application on the following grounds:

(i) that the stamp duty paid in respect of the memorandum of charge did not show that a sum of RM420,000 had been lent to the defendant:

(ii) the plaintiff did not prove that the sum of RM420,000 had been released to the defendant;

(iii) the letter of demand is defective or null and void as there are 2 different sums of outstanding arrears of installment as at different dates stated in the said letter of demand. The 2 different sums of outstanding arrears of installment as at different dates stated in the said letter of demand has no connection with each other and is confusing and misleading

(iv) that the said letter of demand and statutory notice is defective or null and void as the plaintiff by this originating summons is claiming more than what was demanded in the said letter of demand.

(v) that the period of statutory notice is in breach of s. 148(3) of the Sarawak Land Code; and

(vi) the plaintiff's demand that the defendant pay the outstanding balance of the term loan facility within seven days from the date of the statutory notice is prejudicial to the defendant as the said statutory notice is dated 12 March 2004 while the said statutory notice was only posted out on 15 March 2004 as shown by the date in the postal receipt.

The defendant at the outset of the hearing confirmed that he is abandoning the grounds that the plaintiff has failed to comply with O. 83 r. 3(3) and r. 3(7) of the Rules of the High Court 1980 ("the RHC") ie, the figures do not tally and that the plaintiff is attempting to amend the affidavit in support of the originating summons without leave of court.

(3) Grounds (i) and (ii)

I agree with the plaintiff's submission that these grounds are baseless. The memorandum of charge in question bearing Instrument No. L 23612/2000 and registered at the Kuching Land Registry Office on 23 October 2000 (exh. HMK1) ("the said charge") charged by the defendant (chargor) to the plaintiff (chargee) is to secure the repayment of the term loan facility of RM420,000

together with interest at the prescribed rate. By section 2.03 of the said charge the facilities agreement dated 21 September 2000 (exh. HMK2) ("the said facilities agreement") was incorporated into the said charge. *Vide* the averments made in para. 4 of plaintiff's 2nd affidavit, it is clear that the total sum of RM420,000 has been debited into the defendant's account *vide* the plaintiff's debit advice dated 26 September 2000 and 25 October 2000 for the sum of RM180,000 and RM240,000 (exh. HMK6 and exh. HMK7) respectively. *Vide* para. 5 of plaintiff's 2nd affidavit, the plaintiff averred that the total loan of RM180,000 and RM240,000 have been released into defendant's account as is evident by plaintiff's letter to the defendant dated 26 September 2000 and 25 October 2000 respectively. (Exhibit HMK8 and exh. HMK9)

Further, there is no dispute that the defendant has signed and accepted the letter of offer, exh. HMK10 wherein it is stated therein that the purpose of the term loan facility is to purchase land and construction of residential property as this fact is admitted by the defendant that "the monies were to be utilised by him to purchase a piece of land at Stampin, 2 1/2 Mile Rock Road in Kuching *vide* para 7 of the defendant's 2nd affidavit.

The plaintiff has complied with s. 4(3) of the First Schedule of the Stamp Act 1949 and section 16.50 of the said facilities agreement.

From the stamping endorsed on the said facilities agreement, the stamp duty paid was RM2,100 as is evident by an endorsement in the Malay language in the said charge to prove that the same was paid. Further, the appropriate stamp duty of RM10 was paid for the said charge. Thus, it is a non-starter for the defendant to allege that "the plaintiff for reasons better known to themselves had failed to produce any evidence that a stamp duty of RM2,100 had been paid for the memorandum of charge or the facilities agreement".

(4) Ground (iii)

With due respect to learned counsel for the defendant, this ground is also devoid of merit. The defendant has admitted in para. 9 of the defendant's 1st affidavit that he has received the plaintiff's letter of demand and therefore I agree with the learned counsel for the plaintiff's submission that the defendant is well aware that he has defaulted in his repayments towards the term loan facility and he cannot now turn the tables to allege that there is question of any confusion or ambiguity or uncertainty arising. In my view no such situation exists because ultimately, under para. 12 of the plaintiff's 1st affidavit, the particulars pursuant to O. 83 r. 3(3) and r. 3(7) of the RHC have been complied with and particularised as:

(a)	the amount of the advance	RM420,000
(b)	the amount of repayments	RM125,996.13
(c)	the amount of interest/instalments in arrears	RM25,144
(d)	the amount remaining due under the said charge	RM411,772.46
(e)	the amount of a day's interest	RM95.89

As has been pointed out earlier, the defendant is not disputing on the ground of non-compliance by the plaintiff of O. 83 r. 3(3) and r. 3(7) of the RHC.

Knowing fully well that the term loan facility is repayable on demand, and having received the demand, it is my view, that it is incumbent on the defendant to enquire with the plaintiff bank if he is dissatisfied with the status of the account and not merely sit back and it is only when the order for sale application is served upon him raise such a ground as a defence.

In *Citibank NA v. Jong Tze Khiok & Anor* [1993] 4 CLJ 325, the Supreme Court has held that under s. 148(1) of the Sarawak Land Code, it is the default and not the demand for payment under the charge that triggers off the right of the chargee to issue the notice in writing. Such notice is not intended for the purpose of demanding payment of the amount due but to notify the chargor that the chargee would resort to s. 148(2)(c) of the Code for an order for sale of the charged land unless such default is remedied, (see Headnote (1)).

Therefore, it is clear that following *Citibank*'s case, the purpose of the notice was to notify the defendant that the plaintiff intends to apply for sale of the charged land and not to demand for payment under the said charge. The defendant admitted receiving the statutory notice, exh. HMK5.

(5) Ground (iv)

I agree with the plaintiff that this ground is also untenable in the light of the authority of *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Sdn Bhd* [2004] 4 CLJ 793. In this case, the defendant argued that the notice of demand is defective as it included interest with no prior notice of variation given and the Court of Appeal (at p. 3 of 8) opined:

> In the first place ... since it is the defendant who alleges that undue sums were demanded, the burden of proving this fact is, in the ordinary way, on the defendant ... we find that there is nothing to show that the demand contains sums not actually due. Therefore, the defendant has, in our opinion, plainly failed to establish its complaint with sufficient evidentiary backing. In the second place, the defendant having taken the position that the sum demanded was excessive, should have tendered the respondent the sum actually due.

Hence, following the legal proposition enunciated in *Century Land Resources,* the defendant bears the onus of substantiating his complaints by proof that the letter of demand was misleading and confusing and also tender the amount actually due since he claimed that the sum demanded was excessive.

(6) Ground (v)

Section 148(3) of the Sarawak Land Code provides:

> (3) **The notice** under subsection (1) **shall comply with the terms of the charge:**
>
> > Provided that, without prejudice to subsection (4) of section 145, if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given. (emphasis added)

In this instant case, the statutory notice, exh. HMK5, stipulates that the defendant pays the sum of RM404,614.62 from the date of the statutory notice of demand. Clause 4.01 of the said charge requires the defendant to pay the amount claimed under the statutory notice of demand from the date in which the said statutory notice of demand shall be deemed to be served on the defendant under the terms of the said charge. The service of the statutory notice of demand is governed by cl. 4.03 of the said charge where it states that the said statutory notice of demand shall be deemed to be served at the time when the registered or ordinary mail would be the ordinary course of post be delivered. The said statutory notice of demand was sent from the plaintiff in Kuching by registered mail to the defendant in Miri. I agree that looking at the postal receipt on p. 2 of exh. HMK5 in the plaintiff 1st affidavit, it would not be possible for the statutory notice to be delivered to the defendant on the same day. Section 148(3) of the Sarawak Land Code states that the statutory notice shall comply with the terms of the charge. I agree with the submission of Mr. Yi that the word "shall" in s. 148(3) of the Sarawak Land Code would mean that the requirement to comply with the term of the said charge is mandatory. It is patently clear that the statutory notice given by the plaintiff failed to comply with the term of the said charge as the statutory notice requires the defendant to pay the sum of RM404,614.62

within seven days from the date of the said statutory notice while cl. 4.01 of the said charge require the defendant to pay the sum of RM404,614.62 from the date in which the said statutory notice of demand shall be deemed to be served on the defendant under the terms of the said charge. Therefore I agree with Mr.Yi's submission that the statutory notice is null and void for non-compliance with cl. 4.01 of the said charge and for contravening s. 148(3) of the Sarawak Land Code.

(7) Ground (vi)

A perusal of exh. HMK5 would show that the statutory notice dated 12 March 2004 was only sent by registered post to the defendant on 15 March 2004. This is evident from the registered post receipt on p. 2 of exh. HMK5 in the plaintiff 1st affidavit.

Putting aside the issue canvassed in ground (v), I am incline to agree with Mr. Yi's submission that the statutory notice itself give the defendant less than seven days to comply with the plaintiff's demand. By implication it means that the statutory notice also failed to comply with the terms of the said charge as it gives the defendant less than seven days to comply while the said charge states a period of seven days for the defendant to comply with the statutory notice.

In conclusion, it is my finding that the statutory notice, exh. HMK5, is null and void for the reasons contained in grounds (v) and (vi) and it is therefore not just in the circumstances for the court to grant the order for sale applied for by the plaintiff. I hereby dismiss the plaintiff's originating summons dated 11 June 2004 (encl. 3) with costs to be taxed unless otherwise agreed.